IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	Def. ID# 0304013081 (R-1)
v.	:	
MICHAEL R. SMITH,	:	
Defendant.	:	

DECISION ON MOTION FOR POSTCONVICTION RELIEF

MOTION DENIED

DATE SUBMITTED: December 18, 2008

DATE DECIDED: February 18, 2009

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Bradley, J.

Michael Smith ("defendant") has filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). In this motion, defendant asserts numerous claims of ineffective assistance of counsel against counsel who represented him at trial and on appeal (for ease of reference, they are referred to as "trial counsel").[1] Trial counsel have submitted affidavits in response to the allegations of ineffective assistance. Defendant and the State of Delaware ("the State") have fully briefed the issues. No hearing is necessary to decide the pending motion. This is my decision denying defendant's motion for postconviction relief.

FACTS

On April 17, 2003, Shane DeShields ("DeShields") shot and killed George Coverdale ("Coverdale"). Also present at the scene were defendant and DeShawn Blackwell ("Blackwell").

At defendant's trial, the witnesses and evidence proffered various, inconsistent versions of what happened, but the jury accepted the version of events which the State's witnesses set forth.[2] An outline of that version follows.

DeShields and defendant planned to rob Coverdale of drugs. DeShields, defendant, Coverdale and Blackwell were in Coverdale's van. Coverdale was in the driver's seat while Blackwell was in the front passenger seat; DeShields and defendant were in the backseat.

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[1]Counsel representing defendant in this pending motion did not represent defendant at trial and/or on appeal.

[2]As the Supreme Court noted, "By convicting Smith, the jury ultimately chose to believe DeShields and Blackwell's testimony over Smith's, notwithstanding the inconsistencies, contradictions, and untrue statements that defense counsel effectively and carefully brought out on cross-examination." *Smith v. State*, 913 A.2d 1197, 1203 n. 1(Del. 2006). That Court further noted: "Once the jury made its credibility determination and chose to believe DeShields's and Blackwell's testimony over that of Smith, it was certainly no longer a close case." *Id.* at 1218 n. 27.

DeShields robbed Coverdale of the drugs. Coverdale grabbed a gun and exited the vehicle. Defendant fired his weapon; Coverdale returned fire; and DeShields fired his weapon, striking Coverdale. Coverdale did not die immediately. Defendant beat Coverdale and took items from him. Blackwell escaped from DeShields by jumping into a passing vehicle. Defendant and DeShields fled. Coverdale died at the scene.

The jury convicted defendant, as an accomplice, of Second Degree Murder (a lesser-included offense of the charge of Murder in the First Degree); First Degree Murder (recklessly causing the death of Coverdale in the course of and in furtherance of the commission of the felony of Robbery in the First Degree); two counts of First Degree Robbery (one count regarding Coverdale, the other regarding Blackwell); four counts of Possession of a Firearm During the Commission of a Felony (the counts were respectively attached to each of the preceding four felony convictions); and Second Degree Conspiracy (conspiring to engage in the felony of Robbery in the First Degree). The Court sentenced defendant to life in prison.

On appeal, the Supreme Court found that the trial judge did not err, he acted within his discretion, he adequately cured errors about which defendant complained on appeal, and any uncured errors were harmless beyond a reasonable doubt. *Smith v. State*, 913 A.2d 1197 (Del. 2006). Thus, the Supreme Court affirmed the trial judge's rulings and defendant's convictions. *Id.* The Supreme Court mandate was dated May 15, 2006.

Defendant filed his motion for postconviction relief on April 13, 2007.[3] I examine the

[3]Defendant originally advanced two claims which he ultimately withdrew. The first claim, which appeared as Claim (1) in his original motion, was that trial counsel were ineffective for failing to raise the claim, or make any objection, that the State was acting improperly in pursuing the proceeding as a capital murder case. The second claim, contained in an amendment to the motion for postconviction relief, was that "[t]he State was guilty of misconduct in failing to

grounds of the motion below.

DISCUSSION

The motion was timely filed. In it, defendant advances numerous claims of ineffective assistance of counsel which could not be raised until after the direct appeal was final. Thus, no procedural bars apply.[4]

In assessing if trial counsel have been effective, this Court employs the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Delaware's Supreme Court has

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disclose to the defense all of the details of its agreement with ... DeShields ... concerning DeShields's testimony as a witness for the State." Amendment to Motion for Post-Conviction Relief, Docket Entry #202.

[4]In Rule 61(i), it is provided as follows:

> *Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim in warranted in the interest of justice.
> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
> (A) Cause for relief from the procedural default and
> (B) Prejudice from violation of the movant's rights.
> (4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.
> (5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

explained what this standard requires in *Shelton v. State*, 744 A.2d 465, 475 (Del. 2000), *cert. den.,* 530 U.S. 1218 (2000):

> [Defendant] must ... prove that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) that counsel's actions were prejudicial to his defense, *i.e.,* "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The prejudice prong of the *Strickland* standard requires "attention to whether the result of the proceeding was fundamentally unfair or unreliable." There is a strong presumption that defense counsel's conduct constituted sound trial strategy. Further, a defendant "must make specific allegations of actual prejudice and substantiate them." [Footnotes and citations omitted.]

Accord Anker v. State, 941 A.2d 1018, 2008 WL 187962 (Del. Jan. 9, 2008) (TABLE).

1) Arguments regarding counsels' failure to "federalize" claims (Claims 2, 3, 4, 8 and 9)

In five of his claims, defendant argues that trial counsel failed to federalize legal objections and thus, were ineffective. These claims are set forth below.

> **Claim (2):** At trial and in the direct appeal, defense counsel argued that it was error for the trial court to have refused the defense request for a "self defense" instruction and it was also error for the trial court to have given the jury a "negative self defense" instruction. In making these arguments, defense counsel was ineffective under the Sixth Amendment to the United States Constitution because defense counsel failed to "federalize" these claims, i.e.[sic] claim that the errors also violated defendant's federal constitutional rights, so as to preserve such claims for possible federal habeas corpus review.

> **Claim (3):** At trial and in the direct appeal, defense counsel argued that it was error for the trial court to have barred the defense from cross-examining DeShields about a prior arrest for robbery in 2000 and concerning DeShields [sic] testimony that he never "owned" a weapon. In making these arguments, defense counsel was ineffective under the Sixth Amendment to the United States Constitution because defense counsel failed to "federalize" these claims; i.e.[sic] claim that the errors also violated defendant's federal constitutional rights, so as to preserve such claims for possible federal habeas corpus review.

> **Claim (4):** At trial and in the direct appeal, defense counsel argued that it was error for the trial court to have barred the defense from cross-examining DeShawn Blackwell about an arrest for selling drugs and juvenile convictions for robbery. In making these arguments, defense counsel was ineffective under the Sixth

> Amendment to the United States Constitution because defense counsel failed to "federalize" these claims, i.e. [sic] claim that the errors also violated defendant's federal constitutional rights, so as to preserve such claims for possible federal habeas corpus review.
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> **Claim (8):** At trial and in the direct appeal, defense counsel argued that it was error for the trial court to have instructed the jury that Smith could be convicted as a principal in the killing of Coverdale. In making that argument, defense counsel was ineffective under the Sixth Amendment to the United States Constitution because defense counsel failed to "federalize" the claim, i.e. [sic] claim that the error also violated defendant's federal constitutional rights, so as to preserve such claim for possible federal habeas corpus review.
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> **Claim (9):** At trial and in the direct appeal, defense counsel argued that the prosecution was guilty of misconduct in its closing argument to the jury. In making that argument, defense counsel was ineffective under the Sixth Amendment to the United States Constitution because defense counsel failed to "federalize" the claim, i.e. [sic] claim that the error also violated defendant's federal constitutional rights, so as to preserve such claim for possible federal habeas corpus review.

Trial counsel, in their first affidavit, dispute that they failed to "federalize" the issues noted above. Trial Counsels' Joint Affidavit, dated May 14, 2007, located at Docket Entry #200 ("Counsels' 5/14/07 Affidavit").

As to the self-defense issue raised in Claim 2, trial counsel respond:

> We feel that defense counsel did everything that was known to and necessary to federalize the defenses in this case. However, specifically with regards to the way the Court handled the self defense issues we did not articulate federal grounds to support the defense argument and am not aware of any at the present time.

Counsels' 5/14/07 Affidavit at ¶ 2. As to the issues in Claims 3 and 4, trial counsel, in their affidavit, stated that they had federalized the issues by arguing defendant's confrontational rights were violated. *Id.* at ¶¶ 3-4. With regard to the issue in Claim 8, trial counsel explained they were unaware "of anything that could have been done additionally to federalize this since we believe it was based upon sufficiency of the evidence." *Id.* at ¶ 8. As to the issue in Claim 9, trial counsel

explained that they had done all they could do to federalize the prosecutorial misconduct claim. *Id.* at ¶ 9.

These claims fail. The *Strickland* prejudice prong does not contemplate the failure to preserve an issue for federal *habeas corpus* review. *State v. Fudge*, 206 S.W.3d 850, 861 (Ark. 2005); *Johnson v. State*, 157 S.W.3d 151 (Ark. 2004), *cert. den.*, 543 U.S. 932 (2004). Instead, the prejudice prong of *Strickland* is limited in scope to the outcome of the trial or the appeal. *Id.* *Strickland* does not require the Court to speculate as to what a Federal District Court would decide on various legal issues in a *habeas corpus* proceeding. *Accord Weston v. State*, 2006 WL 257202, at * 3 (Del. Super. Jan. 23, 2006), *aff'd*, 918 A.2d 339, 2007 WL 135606 (Del. Jan. 11, 2007) (TABLE). Furthermore, in this case, defendant has failed to cite to a single case that would establish a reasonable probability that a Federal District Court would reverse the judgment in this case. Thus, the allegations of prejudice are conclusory, and conclusory allegations fail. *Shelton v. State*, 744 A.2d at 475; *Younger v. State*, 580 A.2d 552, 555 (Del. 1990); *James v. State*, 2006 WL 1121232, at *14 (Ala. Crim. App. April 28, 2006), *reh. den.* (Aug. 25, 2006); *Johnson v. State*, 2001 WL 1452148, at *3 (Ark. Nov. 15, 2001).

For the foregoing reasons, the Court denies Claims 2, 3, 4, 8 and 9.

2) Claim with regard to felony murder

In Claim (5), defendant argues:

> **Claim (5):** Defense counsel was ineffective under the Sixth Amendment to the United States Constitution in failing to raise a claim that the charge of Felony Murder (Count III) should be dismissed because there was no evidence that the murder was "in furtherance of" any underlying robbery as required under *Williams v. State*, 818 A.2d 906 (Del. 2002).

The applicable version of the felony murder statute, 11 *Del. C.* § 626, provided:

A person is guilty of murder in the first degree when:
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(2) in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person....[5]

59 Del. Laws, ch. 284 (1974).

As the Superior Court noted in *State v. Claudio*, 2008 WL 853799, *3 (Del. Super. April 1, 2008), *aff'd*, 958 A.2d 846 (Del. 2008):

> *Williams* [*v. State*, 818 A.2d 906 (Del. 2002)] and its progeny require a two-part analysis to determine whether a killing was committed "in furtherance of" the underlying felony: (1) did defendant intend to commit a felony that was independent of the killing, and (2) was the murder a necessary part or step in enabling defendant to perpetuate the intended felony?

Trial counsel respond as follows in their affidavit:

> We did not feel that this was a factually strong argument under the particular facts of this case. However, the main reason why this was not argued was because we felt that would be in conflict with the defendant's position of simply being an innocent bystander at the scene of this incident. The state was presenting many conflicting claims of what had occurred while the defendant remained consistent in relaying what had happened. We did not feel it would be helpful at all to present an alternative such as this to the jury, particularly in a case where we felt that the defendant was factually innocent and the evidence supported a not guilty verdict across the board.

Counsels' 5/14/07 Affidavit at ¶ 5.

Defendant argues:

> [T]he failure to raise a *Williams* claim cannot rationally be explained as a "strategic" decision. The *Williams* claim could have been raised by a motion for

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[5]On May 19, 2004, by way of 74 Del. Laws, ch. 246 (2004), this subsection of the statute was amended to provide that a person was guilty of murder in the first degree when:

> (2) While engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person.

> acquittal at the close of the State's case without exposing the jury to the fact that the defense might be presenting inconsistent defenses.

Defendant's Response to Affidavit of Former Defense Counsel, located at Docket Entry #203, at 3. Defendant further argues:

> [T]he requirement that the killing be "in furtherance of" the underlying felony cannot logically be met when the killing itself was unanticipated and unintended, even though it may have been committed with a "reckless" state of mind.

Defendant's Opening Brief in Support of Motion for Post-Conviction Relief, located at Docket Entry #217, at 20. Defendant goes on to argue:

> The requirement in the felony-murder statute that the killing be "in furtherance of" the underlying felony, as explained in *Williams*, i.e., that the killing must move the felony forward, virtually negates the possibility that so-called "accidental" killings, even though recklessly committed, fall within the parameters of the felony-murder statute. The killing itself must serve some purpose and cannot be merely a fortuitous event.

Id. at 21. He argues that a persuasive argument could have been made that the shooting resulted from the argument DeShields and Blackwell got into about Blackwell "snitching" on DeShields within the past couple of days and had nothing to do with the robbery.

Defendant misrepresents DeShields's testimony. The jury listened to audiotapes of the police interviewing DeShields. State's Exhibits 6 and 7. In that interview, DeShields makes very clear that he intended to rob Coverdale of drugs. He explains that he had arranged to buy a certain amount of drugs. When Coverdale handed him the drugs, he put his gun on his lap to scare him. He expected Coverdale to let him (DeShields) have all of the drugs without a fight. That expectation was based on the facts that Coverdale was his cousin and Coverdale had been involved in a similar situation with another victim before. Unfortunately, Coverdale grabbed his gun and jumped out of the car. Defendant fired his gun and then DeShields fired his, hitting

Coverdale.

The trial testimony, although not as clear as the interview statements, provided evidence of this robbery. Deshields testified that he intended to rob Coverdale all along. Transcript of January 20, 2005, Proceedings, which are located at Docket Entry #130, at G-25; G-72-3 (hereinafter "D.E. 130-__").[6] Coverdale gave DeShields the drugs. D.E. 130-26. DeShields displayed his gun. D.E. 130-76. He displayed it in order to scare Coverdale. *Id.* Coverdale jumped out of the car with a gun. D.E. 130-26, 28. Smith fired at him; Coverdale fired back; and DeShields shot Coverdale. D.E. 130-25-6, 28. DeShields testified that these events happened in very quick succession; there was no time period between the events. D.E. 130-29.

Defendant argues that the robbery was over and Coverdale was escaping. Thus, the shooting did not occur within the context of the robbery and Coverdale was not resisting the robbery.

Defendant's argument ignores the facts establishing the quick succession of events and how they all were tied up together. Coverdale handed DeShields the drugs; DeShields then pulled out a gun and conveys the message he is taking the drugs; Coverdale gets his gun and exits the vehicle; Smith fires his gun; Coverdale fires back; and DeShields shoots Coverdale. Coverdale's attempt to flee with his gun and his firing back during the robbery evidence he was not going to cooperate with a robbery. Thereafter, DeShields robbed Blackwell while Smith robbed Coverdale. As I ruled in *DeShields v. State*, Del. Super., Def. ID# 0304012359A, Bradley, J. (Jan. 30, 2009), this evidence establishes that the shooting facilitated the commission of robbery

[6]There are two transcripts from the January 20, 2005, Proceedings and both are labeled "Volume G"; thus, reference to each separate transcript must be made to the docket entry number rather than the volume number.

in the first degree. *Burrell v. State*, 953 A.2d 957 (Del. 2008); *State v. Hackett*, 2008 WL 3906753 (Del. Super. Aug. 21, 2008); *State v. Claudio*, *supra*; *State v. Garvey*, 2008 WL 1952159 (Del. Super. Feb. 13, 2008), *aff'd*, 2008 WL 4809435 (Del. Nov. 5, 2008), *rearg. den.* (Dec. 2, 2008)(TABLE); *State v. Hill*, 2008 WL 361227 (Del. Super. Jan. 31, 2008), *aff'd*, 959 A.2d 28, 2008 WL 4151828 (Del. Sept. 10, 2008), *rearg. den.* (Oct. 3, 2008) (TABLE).

Although defense counsel could have made the argument that the killing was not in furtherance of the robbery, that argument would not have been successful. The Court would not have dismissed the felony murder charge based on these facts. Consequently, defendant cannot establish the prejudice prong on this ineffective assistance of counsel claim. Finally, to the extent defendant argues that only a conviction of an intentional killing can support a finding that the killing was "in furtherance of" the robbery, "that argument is incorrect as a matter of law." *State v. Garvey,* 2008 WL 4809435, *1 (Del. Nov. 5, 2008), *citing Burrell v. State, supra.* This claim is denied.[7]

3) Claim regarding *corpus delicti*

The *corpus delicti* issue appears in Claim (6). Therein, defendant asserts:

> **Claim (6):** Defense counsel was ineffective under the Sixth Amendment of the United States Constitution in failing to raise a claim that the evidence was insufficient as a matter of law to support a conviction for Robbery based on the allegation that illegal drugs were taken from Coverdale.

Defendant argues that since the only evidence of the robbery was based upon DeShields's

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[7]Defendant argues that defense counsel should have made the same argument with regard to the robberies of Coverdale and Blackwell that occurred after Coverdale was shot. The State addresses this argument only to clarify that it "did not directly argue that the murder was in furtherance of either the robbery of DeShawn Blackwell or the subsequent robbery of Coverdale after he was shot." State's Reply Brief to Defendant's Motion for Post-Conviction Relief, located at Docket Entry #226, at 8.

testimony, the *corpus delicti* rule enunciated in *DeJesus v. State*, 655 A.2d 1180, 1202 (Del. 1995) was not satisfied. As the State correctly argues, this argument is legally meritless.

In *DeJesus*, the Supreme Court held at 1202:

> [B]ecause felony murder necessarily involves both a homicide and a separate felony, to satisfy the *corpus delicti* rule in such cases, the State must provide corroborative evidence that (1) a death occurred; (2) the death was caused by criminal agency; and (3) the underlying predicate felony was committed.

First, as of 1996, the law in *DeJesus* no longer applied to compound crimes. 11 *Del. C.* § 301(c);[8] *Wright v. State*, 953 A.2d 188, 191-92 (Del. 2008). Second, the *corpus delicti* rule applies where the only evidence is the defendant's confession; i.e., to prove a crime against a defendant, the State must present evidence other than the defendant's confession. *DeJesus v. State*, 655 A.2d at 1202. In this case, it was not Smith's confession which established the robbery. Instead, it was DeShields's testimony.

Since the *corpus delicti* rule does not apply and the ruling in *DeJesus* does not apply, this argument is legally meritless and this claim of ineffective assistance of counsel fails.

4) Jury instruction claim

In his seventh claim, defendant attacks trial counsels' failure to request a jury instruction:

> **Claim (7):** Defense counsel was ineffective under the Sixth Amendment to the United States Constitution in failing to request a jury instruction under *Bland v. State*, 263 A.2d 286, 289-90 (Del. 1970) and *Cabrera v. State*, 747 A.2d 543, 544-

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[8]In July, 1996, the legislature added subsection (c) to 11 *Del. C.* § 301, which provides:

> In any prosecution for any compound crime, including but not limited to first degree murder under § 636(a)(2) or (a)(6) of this title or for second degree murder under § 635 (2) of this title, the corpus delicti of the underlying felony need not be proved independently of a defendant's extrajudicial statement.

70 *Del. Laws*, ch. 463, § 1 (July 9, 1996).

545 (Del. 2000) concerning the testimony of DeShields.

Trial counsel state in their affidavit that they "believe that this is a valid claim by the defendant." Counsels' 5/14/07 Affidavit at ¶ 7. The State responds that defendant was not entitled to any particular form of words or phrases; instead, he was entitled to a correct statement of the law and he received that. Thus, defendant cannot establish any prejudice.

At one point, case law suggested that a Court instruct a jury that the testimony of an accomplice should be examined "with suspicion and great caution." *Bland v. State*, 263 A.2d 286 (Del. 1970).[9] However, as explained in *Bordley v. State*, 832 A.2d 1250, 2003 WL 22227558, at *2 (Del. Sept. 24, 2003) (TABLE), four years after *Bland* was decided, a committee drafted a new set of pattern jury instructions for use with the newly enacted Delaware Criminal Code and those instructions did not contain the *Bland* language with regard to accomplice testimony.[10] The

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[9]The jury instruction the Supreme Court suggested in *Bland* provided:

> A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with suspicion and great caution. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.

Bland v. State, 263 A.2d at 289-90.

[10]The pattern jury instruction, which is the instruction given in the *Bordley* case, provided:

> The testimony of the alleged accomplice, someone who said that [he/she]

Court went on to explain, in pertinent part as follows in *Bordley v. State*, *supra,* at * 2:

> 8. Furthermore, in *Cabrera* [*v. State*, 747 A.2d 543 (Del. 2000)], this Court held that the pattern jury instructions "are a most valuable resource and should be consulted in the first instance when the trial court is conducting a prayer conference and selecting the wording of its instructions." FN8 We recognize that the pattern instructions are not mandatory and that this Court has upheld instructions that have varied from the pattern jury instructions.FN9 As a general rule, however, a defendant is not entitled to a particular instruction, but she does have the unqualified right to a correct statement of the law.FN10 *** Moreover, "a trial court's instructions will not be the basis for reversible error if they [correctly state the law and] 'are reasonably informative and not misleading, judged by common practices and standards of verbal communication.'" FN13
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> FN8. *Cabrera*, 747 A.2d at 545.
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> FN9. *Floray v. State*, 720 A.2d 1132, 1138 (Del.1998).
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> FN10. *Id.*
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> FN11. *Cabrera*, 747 A.2d at 544.
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> FN12. *Id.* at 543.
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> FN13. *Sirmans v. Penn*, 588 A.2d 1103, 1104 (Del.1991) (*citing Haas v. United Technologies Corp.*, 450 A.2d 1173, 1179 (Del.1982)) (*quoting Baker v. Reid*, 57 A.2d 103, 109 (Del.1947); *Culver v. Bennett*, 588 A.2d 1094 (Del.1991)).

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participated with another person in the commission of a crime, has been presented in this case.

_____ may be considered an alleged accomplice in this case.

The fact that an alleged accomplice has entered a plea of guilty to the offense charged does not mean that any other person is guilty of the offense charged.

As stated elsewhere in these instructions, you are the sole judges of the credibility of each witness and of the weight to be given to the testimony of each. You may consider all the factors which might affect and witness' credibility, including whether the testimony of the accomplice has been affected by self-interest, by an agreement [he/she] may have with the State, by [his/her] own interest in the outcome of the case, by prejudice against the Defendant, and whether or not the testimony is corroborated by any other evidence in the case.

> 9. In the present case, the trial judge read the pattern jury instruction and not the defendant's proposed jury instruction. The instruction given did, in fact, warn that the testimony of Cry, the accomplice, may be affected by self-interest, by an agreement she may have with the State, by her own interest in the outcome, and by prejudice against the defendant. The record demonstrates that the pattern jury instruction used by the trial judge was a correct statement of the law and adequately guided the jury as trier of fact and determiner of credibility. Accordingly, the trial judge followed well-settled standards governing jury instructions. Under these circumstances, there is no basis to conclude that he abused his discretion by refusing to give the requested instruction.

Accord Soliman v. State, 918 A.2d 339, 2007 WL 63359 (Del. Jan. 10, 2007) (TABLE) (holding that it was not an abuse of discretion for the trial judge to refuse an attorney's request that the Court give the instruction set forth in *Bland).*

In this case, the Court and the parties agreed that they did not want the jury to know the outcome of DeShields's trial for Coverdale's murder and everyone took pains to insure that information did not come out during DeShields's testimony. Transcript of January 20, 2005, Proceedings, which are located at Docket Entry #164, at G-3- G-7; G-95-6. Thus, it would have been inappropriate to give the portion of the pattern instruction informing the jury that the fact DeShields had been convicted of certain offenses charged did not mean that Smith was guilty of the offenses charged. The Court gave the rest of the accomplice charge, which was to view the testimony of each witness in light of his or her situation, motives, self-interest, prejudice, when it instructed the jury as follows:

> CREDIBILITY OF WITNESSES AND CONFLICTS IN TESTIMONY
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> You are the sole judge of the credibility of each witness, including any expert witness, who has testified and of the weight to be given to the testimony of each.
>
> If you should find the evidence in this case to be in conflict, then it is within your province to reconcile the conflicts if you can so as to make one harmonious story of it all. If you cannot reconcile these conflicts, then it is your duty to give credit to that portion of the testimony which you believe is worthy of credit, and you may disregard that portion of the testimony which you do not believe to be worthy of credit.

> In considering the credibility of witnesses and in considering any conflict in testimony, you should take into consideration each witness' means of knowledge, strength of memory and opportunity for observations, the reasonableness or unreasonableness of the testimony, the consistency or inconsistency of the testimony, the motives actuating the witness, the fact, if it is a fact, that the testimony has been contradicted, the witness' bias, or prejudice, or interest in the outcome of this litigation, the ability of the witness to have acquired the knowledge of the facts to which the witness testified, the manner and demeanor of the witness while on the witness stand, and the apparent truthfulness of the testimony, and any and all other facts and circumstances shown by the evidence which affect the credibility of the testimony.

Transcript of February 2, 2005, Proceedings at N–58-9.

Thus, the instruction given adequately guided the jury as trier of fact and determiner of credibility. The instruction correctly stated the law and enabled the jury to perform its duty. *Miller v. State*, 893 A.2d 937, 949 (Del. 2006). Defendant did not suffer any prejudice. This claim fails.

5) Claim based on affidavit of defendant's investigator

Claim (10) pertains to defendant's investigator:

> **Claim (10):** Defense counsel was ineffective under the Sixth Amendment to the United States Constitution because defense counsel failed to call the defendant's investigator as a witness to rebut Blackwell's testimony that he saw Smith beating Coverdale.

Trial counsels' response in their affidavit is as follows: "From the bare allegation contained here we are unaware of what the investigator could have testified specifically to rebut this portion of the evidence." Counsels' 5/14/07 Affidavit at ¶ 10. Defendant responds as follows:

> One of the things that was done by the defense investigator was to reconstruct the crime scene to determine whether Blackwell was in a position to see the defendant beating Coverdale after Coverdale had been shot. The investigator was of the opinion that Blackwell could not have observed such events, but the investigator was never called as a witness.

Defendant's Response to Affidavit of Former Defense Counsel, Docket Entry #203, at 4. In support of this argument, defendant submits an affidavit of John E. Slagowski, wherein Mr. Slagowski states, in pertinent part, as follows:

> 1. I am a principal in the first of S & H Investigative Services ("S & H") Inc. .... S & H is a private investigative agency and has been involved in conducting investigations in criminal cases for over 20 years.
> 2. During the latter part of 2004 and into 2005, S & H was hired by Edward C. Gill, Esquire to assist him in the preparation of the defense in the case of State of Delaware v. Michael Smith.
> 3. Our investigation included a review of statements made by DeShawn Blackwell that he was able to see Michael Smith beating on George Coverdale after the van he was in had pulled behind an abandoned house on the crime scene property.
> 4. I visited the crime scene to determine if it was possible, based on the location where Coverdale's body was found, that Blackwell was in a position to see Smith beating on Coverdale. Based on our observations, it was my opinion that it was unlikely that Blackwell was in a position to see whether or not Smith was beating on Coverdale.

Affidavit of John E. Slagowski, located at Docket Entry #217, at A-56.

The Court will not analyze this argument under the *Strickland* standard because it is too vague to merit consideration. *Younger v. State*, 580 A.2d at 555. In order to understand how the Court reaches this conclusion, I examine Blackwell's statements about observing Smith hitting or kicking or beating on Coverdale. These statements appear in police interviews dated April 17, 2003 and April 25, 2003, which are located at Court's Exhibit #4, and in Blackwell's trial testimony.

The facts show that there were two houses involved in the scene of the crime: DeShields's grandmother's house and an abandoned house beside the grandmother's house. In the April 17, 2003, interview, Blackwell made the following statements. When the shooting started, he jumped out of the van onto the ground. Transcript of April 17, 2003, Interview at 33,

35-6. Coverdale stumbled to the side of DeShields's grandmother's house and Smith went over towards Coverdale. *Id.* at 36. DeShields made Blackwell get back into the van and drove the van around to the back of the abandoned house. *Id.* at 37. Thereafter, DeShields left Blackwell in the van and walked over to Coverdale and Smith, who were on the side of the grandmother's house. *Id.* at 39. Blackwell walked around the house and that is when he escaped. *Id.*

In the April 25, 2003, statement, Blackwell stated the following. When Blackwell initially jumped out of the van, he saw Smith kick Coverdale "in his stomach or whatever." Transcript of April 25, 2003, Interview at 12. DeShields made him get in the van and he drove it behind DeShields's "grandmas [sic] house, we went behind his grandmas [sic], there's like a house next to it, and he parked the van." *Id.* When asked how many times he saw Smith hit Coverdale, he said he saw him kick him once and then before he ran, when he looked back, "he was like ... like ... like ... had him like this, like he was trying ... he was pulling his chain off his neck." *Id.* at 13.

During his trial, Blackwell testified to the following. There were three places where Blackwell saw Smith kicking/beating Coverdale. One location was on the side of the van. Transcript of January 24, 2005, Proceedings at H-117, 118, 120, 121 (hereinafter, "H-__"). This is when Smith kicked Coverdale in the stomach. H-121, 122. The second location was by the side of the house by the trash. H-120, 121, 128, 129. Blackwell saw this when he was getting back into the van at DeShields's command. H-121. The third location was in the back of the grandmother's house; Blackwell saw Smith hitting Coverdale with the gun and snatching something off Coverdale's neck. H-120, 130, 131. Blackwell saw this when he was running from the scene. H-120. This location is where the car [not the van] was parked. H-132. The last spot he saw Coverdale was behind DeShields's grandmother's house. H-120, H-146. Blackwell was

walking around the house where the van was parked (the abandoned house), not where Coverdale was being beaten. H-135-136. On cross-examination, Blackwell disputed the characterization that on page 39 of the April 17, 2003, transcript he stated he told Detective Maher he "walked real slow towards the house". H-136. The mischaracterization was of the following statement located on page 39 of the April 17, 2003, transcript: "That's what I'm saying, I walked right here, like walked right around here to around the house." He explained at trial that he was not saying he walked around the house where Coverdale was being beat; he was saying he walked "[a]round the house where the van was parked." H-136; 137. It was made clear that there were two houses and Blackwell clarified about which house he was talking. H-138.

Slagowski's affidavit does not establish that the location where the body was found is the location where Blackwell last saw Coverdale being assaulted. Slagowski's affidavit does not deal with the fact that Blackwell's trial testimony clarified he was going around the abandoned house and not the grandmother's house. The trial testimony differed from how the defense anticipated Blackwell's testimony was to be before the trial began. Slagowski's affidavit does not deal with the facts as they developed; does not clarify anything; and is useless. Thus, the Court will not consider this affidavit or the argument submitted in connection therewith. This claim fails.

6) Claim involving Crista McDaniel

Defendant advances an argument citing ineffectiveness based on Crista McDaniel's ("McDaniel") testimony.

> **Claim (11):** Defense counsel was ineffective under the Sixth Amendment to the United States Constitution because defense counsel failed to secure or preserve the testimony of Crista McDaniel who could have testified to contradictory statements made by DeShields concerning the timing of the "drug" robbery. Such testimony would have been valuable to support the claim that Coverdale's killing was not "in furtherance" of any robbery.

In their affidavit, trial counsel state: "We have no present recollection of what Crista McDaniel's testimony was in this case so [sic] can have no further comment." Counsels' 5/14/07 Affidavit at ¶ 11. In Defendant's Opening Brief in Support of Motion for Post-Conviction Relief at pages 15-16, defendant states/argues:

> Ms. McDaniel is a psychologist employed at the Delaware Psychiatric Center. She conducted a "competency examination" of DeShields on June 23, 2003, which was shortly after the robbery/homicide. In Ms. McDaniels' [sic] Report, she related that DeShields gave her two different versions as to how the "drug robbery" occurred. In the first version, DeShields took the drugs **before** any shooting occurred. In the second version, DeShields stated that he took the drugs **after the shooting** when he moved the van behind the abandoned house. (A57-A59). If Ms. McDaniel had been called as a witness, evidence concerning her interview with DeShields and her report would have come in as evidence at Smith's trial. This evidence would have further undermined the credibility of DeShields. Finally, ... there is no conceivable trial strategy for failing to utilize this evidence. [Emphasis in original.] [11]

This argument is meritless. To understand that conclusion, it is necessary to set forth the allegedly conflicting statements contained in McDaniel's report:

> Mr. DeShields did not believe that his behavior had been unusual or bizarre at the time of the incident. He said, "My behavior was just the way I act - it is not like me carrying a gun - me and my brother had been talking about a quick way to get money. The gun was brought to me. I planned one thing then the whole thing turned 360."
>
> Mr. DeShields said that there had been about thirty to forty-five minutes of planning, before the alleged offense. He states that he was aware that the actions he had been planning were illegal. When asked if his actions had been intentional, Mr. DeShields said that his actions had been intentional, but added, "It didn't work out the way it was going to." He said that, "When I see the gun, see him fire - I was the last one to shoot." He then gave the following account:
>
> "*I sold drugs, spent time with my girl, my uncle died and everyone came down,*

[11]Unfortunately, defendant did not provide all of this information in his moving documents so that trial counsel were not able to provide an informed response in Counsels' 5/14/07 Affidavit.

> *and we had dinners. It was hectic that week. I spent a lot of time with my girl. I woke up met my girl - went home and talked to my Mom - went to my aunts [sic] house - all my family was there. My sister called. I talked to my brother - came back in about two hours. Went to the store, rode around, then went back to my Grandmother's house. Thai [sic] is where everything happened. My cousin came over - sister's brother got into the van - we talked for a bit - smoked a little weed. I put my gun in my lap and took the drugs. He grabbed his gun by the seat - got out of the truck - My sister's brother shot, then I shot. He (George) grabbed his chest, stumbled, and fell. George had been shooting at the truck. I moved the truck behind the abandoned house and I took the drugs. Michael was pistol whipping - I told George I would call an ambulance. I told George he would be all right. My Mom was getting the word. Everywhere I went they were there, I didn't eat for 4 days. I came to my Mother's house and I called Detective Mayer of the homicide unit. They took me to Troop 4 - told me the charges, talked to me and processed me. I had another lawyer. I told them (police) some - a little - but waited to talk to my lawyer."* [Italics in original.]

Report of Crista McDaniel, Psy.D., located at Docket Entry #217, at A-58-9.

First, as the State argues, these statements do not appear to be conflicting. The obvious interpretation is that DeShields is saying he robbed Coverdale of the drugs and after the shooting and moving the van to the back of the house, he removed the drugs from the van. These "conflicting" statements would not establish that DeShields was not being truthful in his testimony. Even if the statements were deemed to be conflicting, defendant cannot show that the outcome would have been different. In fact, had McDaniel testified, the entire statement would have come in and it would have reinforced much of the State's version of events. The substantiality of the planning before the robbery is pronounced in this statement. This information would have harmed defendant. The harm from the statement is greater than any remote benefit, if any, the "conflicting" statements would have provided.

There is no prejudice even if trial counsel were deemed ineffective for failing to call McDaniel to testify. Thus, this claim fails.

7) Claim regarding defendant being in handcuffs

The next claim involves issues arising from defendant's contentions that some of the jurors may have seen defendant in handcuffs. Defendant asserts in Claim (12), the following:

> **Claim (12):** During the course of jury selection, a number of potential jurors saw Smith in handcuffs. Defense counsel was ineffective under the Sixth Amendment to the United States Constitution because defense counsel failed to ask the court to question the jurors who saw the defendant in handcuffs about possible prejudice and to seek the dismissal of individual jurors who may have harbored such prejudice.

At the time trial counsel filed a response, defendant had not yet amended this claim to include assertions regarding a prosecution witness and two defense witnesses. Thus, trial counsels' response in Counsels' 5/14/07 Affidavit is limited to defendant's claims about him being handcuffed:

> During the course of jury selection the defendant was taken, over defense counsel's objection, in handcuffs before members of the jury. This formed one of the basis [sic] for appeal. Defense counsel felt that sufficient record was made of this error to warrant remedial action being taken.

Counsels' 5/14/07 Affidavit at ¶ 12.

A review of the Transcript of the January 10, 2005, Proceedings at A-5 -7 (hereinafter, "A-__") shows the following.

Defendant was dressed in street clothes for the trial. Before the trial began, when two or three members of the jury venire were in the courtroom, guards handcuffed defendant and took him out of the courtroom. The event was quiet and quick and the two or three persons present were otherwise occupied with verifying their assignments. Trial counsel objected to the event taking place. The Court asked trial counsel if he wished to question any of the jurors who came in about the event. Trial counsel replied: "Right now, I don't want to do anything else to try to

highlight it. So I am not asking for a curative at this point." A-7.

Despite efforts made not to bring out defendant's incarcerated status, one of the witnesses referenced the fact that defendant was incarcerated. Transcript of January 27, 2005, Proceedings at K-91, 95.

On appeal, defendant asserted errors regarding the handcuffing event and the testimony he was incarcerated. As related by the Supreme Court in *Smith v. State*, 913 A.2d at 1120-21:

> On appeal, Smith argues that the trial judge erred by denying his Motion for a Mistrial. Smith claims that the prosecutor's intentional elicitation of Dismuke's inadmissible testimony coupled with the fact that the jury venire saw Smith in handcuffs before trial,FN35 substantially prejudiced him and denied him his right to a fair trial. FN36 "A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.' " FN37 Furthermore, a mistrial is "mandated only where there are 'no meaningful and practical alternatives' to that remedy." FN38 "The trial judge is in the best position to assess whether a mistrial should be granted, and may exercise his discretion in deciding whether to grant a mistrial." FN39 Absent an abuse of that discretion, we will not disturb the trial judge's decision.FN40
>
> FN35. During the jury selection process and while the jury venire was in the courtroom, a correction officer transported Smith from the courtroom in handcuffs. Smith has presented no evidence indicating that any members of this venire actually saw the handcuffs. Moreover, the record does not reflect that any seated juror was among those in the venire who may have seen Smith in handcuffs.
>
> FN36. Smith suggests that we should engage in a *Hughes* analysis to determine the prejudicial affect of Dismuke's testimony because the prosecutor intentionally elicited inadmissible evidence. The trial judge found that the prosecutor simply made a mistake and Smith has provided no evidence to suggest that the trial judge's finding was clearly erroneous. Therefore, we accept the trial judge's factual finding that the prosecutor made a mistake.
>
> FN37. *Hendricks v. State*, 871 A.2d 1118, 1122 (Del.2005)(*quoting Steckel v. State*, 711 A.2d 5, 11 (Del.1998)).
>
> FN38. *Ashley v. State*, 798 A.2d 1019, 1022 (Del.2002) (*quoting Dawson v. State*, 637 A.2d 57, 62 (Del.1994)).
>
> FN39. *Bowe v. State*, 514 A.2d 408, 410 (Del.1986). *See also Sawyer v. State*, 634 A.2d 377, 379 (Del.1993)(The abuse of discretion standard "takes into consideration the trial judge's unique perspective in gauging the impact of the allegedly prejudicial conduct in

the trial setting.").

FN40. *Id*.

We first discuss Smith's claim that significant prejudice resulted, requiring a mistrial, because the jury venire saw Smith in handcuffs. FN41 In *Duonnolo v. State*,FN42 we held that a jury venire's viewing of the defendant in handcuffs, by itself, does not amount to reversible error.FN43 Smith has failed to articulate how the jury venire's brief, incidental viewing of Smith in handcuffs caused any prejudice. Smith also cannot demonstrate that any members of the venire who saw Smith in handcuffs were actually seated on the jury.

FN41. It is worth noting that Smith never sought a curative instruction or a new venire after the venire saw him in handcuffs. Arguably Smith has waived any appeal on these grounds. Smith now attempts to couple this argument with another argument that he did preserve for appeal.

FN42. 397 A.2d 126, 130-31 (Del.1978)(*citing Brookins v. State*, 354 A.2d 422, 425 (Del.1976)("Indeed, it is generally held that there is no reversible error if members of the jury view a defendant in handcuffs when he is in custody outside the courtroom itself or while he is being transferred to and from the courtroom.")).

FN43. *See also Slater v. State*, 1995 WL 89955 (Del.Supr. Mar. 1, 1995)

Smith attempts to distinguish his case from *Duonnolo* by arguing that the jury venire not only saw him in handcuffs, but the actual jury also heard testimony from Dismuke about Smith's incarceration. This argument lacks merit. We cannot find that Dismuke's testimony exacerbated any prejudice to Smith because the trial judge gave a curative instruction, which defense counsel crafted, immediately after Dismuke testified about Smith's incarceration. We have consistently held that "even when prejudicial evidence is admitted, its prompt excision followed by a cautionary instruction will usually preclude a finding of reversible error." FN44 We are satisfied that the trial judge's prompt curative instruction blunted any prejudice resulting from Dismuke's testimony about Smith's incarceration. The curative instruction was an adequate, practical, and meaningful alternative to granting a mistrial.FN45 Therefore, no manifest necessity for a mistrial existed and the trial judge properly acted within his discretion.

FN44. *Sawyer*, 634 A.2d at 380 (*citing Pennell v. State*, 602 A.2d 48, 52 (Del.1991)).

FN45. *See Ashley v. State*, 798 A.2d at 1022, n. 15 (*citing Ney v. State*, 713 A.2d 932 (Del.1998)) ("stating that 'in certain cases a cautionary instruction is a 'meaningful and practical' alternative obviating the need for a mistrial.' ")

In this case, trial counsel objected to defendant being taken from the courtroom in

handcuffs and then pursued the issue on appeal. The Supreme Court ruled that Smith has failed to show that any member of the venire saw him in handcuffs and how he suffered prejudice. Defendant now argues that trial counsel were ineffective because they failed to consult with him before making the strategic choice not to question each member of the jury panel, whether they were picked for his jury or not, if he or she saw defendant in handcuffs. Defendant argues the prejudice to him is that now there is no way to determine whether any of the jurors actually saw him in handcuffs and if so, whether those jurors ended up on the jury and whether seeing him in handcuffs might have influenced their verdict. What defendant fails to acknowledge in his argument is that the only way he could have known whether members of the jury who ultimately were picked on the jury saw him in handcuffs would have been to ask them if they saw him in handcuffs. Thus, if they had not been aware that he was handcuffed before, they then would have been made aware of the event. Trial counsels' decision not to call attention to the matter was more beneficial to defendant than the alternative.

Defendant has failed to show how trial counsels' strategic decision not to call attention to all members of a jury venire that defendant was incarcerated falls below an objective standard of reasonableness. Additionally, defendant fails to show how this decision resulted in prejudice to him. Thus, this claim fails.

8) Claims regarding prosecution and defense witnesses testifying while in shackles and prison garb

In his briefing, defendant amends his claims to add that trial counsel were ineffective because they failed to pursue issues raised by the facts that a prosecution witness and two defense witnesses testified in shackles while wearing prison garb. Defendant states in his affidavit

attached to the Supplement to Defendant's Opening Brief in Support of Motion for Post-Conviction Relief (Docket Entry #238), that Shane DeShields, a State witness and defendant's co-conspirator, as well as Duane Dismuke ("Dismuke") and Keith Nelson ("Nelson"), both defense witnesses,[12] testified in shackles while wearing prison garb. Defendant argues trial counsel should have objected to the witnesses testifying while in shackles and prison garb. He argues the defense witnesses's appearances suggested that they were dangerous people who should not be trusted and that suggestion, consequently, impacted their credibility. With regard to DeShields, he argues as follows. DeShields was defendant's co-conspirator and he testified to a criminal association with defendant. DeShields's appearance demonstrated guilt and his status as a prisoner. These combined factors prejudiced defendant's presumption of innocence.

In order to analyze defendant's argument, it is necessary to point out certain aspects of the three witnesses' testimony.

The purpose of Dismuke's testimony was to impeach DeShields's testimony. Defendant elicited that Dismuke was incarcerated and it was while both were incarcerated that he had contact with DeShields. K-57-8. Dismuke claimed that DeShields told him to tell defendant that unless defendant helped DeShields obtain a private lawyer, DeShields would bring defendant down with him. K-58-60. Dismuke also testified that DeShields told him that defendant had nothing to do with the robbery and murder. K-59-60.

On cross-examination, in order to impeach Dismuke, the State was able to bring out the facts that Dismuke had been convicted of the crime of theft misdemeanor and adjudicated

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[12]Dismuke's testimony is located in the Transcript of the January 27, 2005, Proceedings at K-57-104 ("K-__"). Nelson's testimony is located at K-104-47.

delinquent for the crime of theft and that both crimes are ones of dishonesty. K-81-2. The State also was able to establish that Dismuke had seven (7) felony charges pending against him at that time. K-82.

Nelson, who personally knew DeShields and Blackwell, but not defendant, testified that he talked to DeShields and Blackwell before the robbery and they were the ones planning the robbery. He further testified that Blackwell later told Nelson that he (Blackwell) was the one who gave the gun to DeShields. K-111-21.

Nelson himself explained, unsolicited, that he was incarcerated. K-122; K-142. On cross-examination, in order to impeach Nelson, the State was able to bring out that Nelson had been convicted of two felonies on June 11, 2003 (K-129); "a theft misdemeanor, a crime of dishonesty, on October 13, 1998" (K-130); another "theft misdemeanor, a crime of dishonesty, on February 5, 1999" (K-130); also on February 5, 1999, "receiving stolen property, a misdemeanor, a crime of dishonesty" (K-131); "criminal impersonation, a crime of dishonesty, on August 31, 2002" (K-131); "criminal impersonation, a crime of dishonesty, on June 11, 2003" (K-131-32); "shoplifting, a misdemeanor, a crime of dishonesty" on June 11, 2003 (K-132); and "theft misdemeanor, a crime of dishonesty, on August 18, 2003" (K-132).

With regard to DeShields, defense counsel stated:

> I think there has been plenty of testimony that Mr. DeShields was incarcerated and did show up here in his jump suit. So I don't think it's no surprise to anybody that he was incarcerated at that time.

K-124.

Trial counsel have submitted affidavits in response to these assertions that the three witnesses appeared in leg shackles while wearing prison garb. Edward C. Gill, Esquire, in his

affidavit in response to the assertions of this claim, states: "That after review and discussing this matter with co-counsel, I have no independent recollection of whether or not this occurred and no recollection of a strategic decision being made regarding objections or jury instruction." Michael R. Abram, Esquire, explained as follows. He has no recollection about whether any witnesses were wearing shackles; he does recall that all three were wearing prison garb. He does not believe he had any conversation with defendant or co-counsel about the appearances of these witnesses and he does not recall any conversation regarding a jury instruction regarding the appearance of these witnesses.

There is no need for a hearing on the matter of the prison attire and shackles. There is no dispute that all three witnesses wore prison clothes. This Court has no independent recollection of the witnesses being shackled. Trial counsel cannot recall whether the three witnesses had on leg shackles. A factual hearing would be fruitless. The Court will accept defendant's representation that these three witnesses were shackled.

The ultimate question is whether defendant is entitled to a new trial because trial counsel did not object to these witnesses testifying in prison garb and shackles.

The only Delaware case which the Court located touching on this issue is *State v. Smith*, 2008 WL 4455640 (Del. Super. Oct. 2, 2008). Therein, the defendant argued trial counsel was ineffective for failing to insure that restraints worn by two incarcerated witnesses were removed. The Court ruled:

> Defense counsel had no control over what the two inmates wore in the courtroom. Furthermore, both inmates acknowledged on the stand that they were prisoners, so Defendant suffered no prejudice from their clothes.

State v. Smith, supra, at *4. Although this Court reaches the same conclusion in this case, i.e.,

that there was no prejudice here, it is compelled to deal in more detail with defendant's argument.

There are various positions about what to do regarding witnesses testifying in prison garb and restraints.

New Jersey has taken an extreme approach. In *State v. Artwell*, 832 A.2d 295 (N.J. 2003), the New Jersey Supreme Court ruled that defense witnesses cannot appear in prison garb and that a witness can testify in shackles only after a hearing on the security issue takes place. Furthermore, if the Court allows the witness to testify in restraints, then the Court must instruct the jury that it is not to give any consideration to those restraints in assessing proof and determining guilt. The Court ruled that the defense did not have to request an inmate to appear in street clothes; instead, the prison must provide such and have the inmate in those street clothes before the inmate enters the courtroom. The rationale is that the restraints and prison attire attach negatively to the witness's credibility and presents defendant as one who associates with individuals of questionable character.

New Jersey extended the *Artwell* rulings to State's witnesses who were co-conspirators with a defendant in *State v. Russell*, 895 A.2d 1163 (N.J. Super. App. Div. 2006). The rationale was that the status of the witness was more important than for whom the person was testifying; as a co-conspirator, a shackled witness implied danger and violence, thereby reflecting badly on the defendant.

The Federal District Courts have ruled that defendants have a right to have their own witnesses appear before a jury without restraints because restraints distract from the witness's credibility. *Harrell v. Israel*, 672 F.2d 632, 635 (7th Cir. 1982). That right, however, is not

absolute. *Id.*

The Supreme Court of the State of Washington ruled as follows in *State v. Rodriguez*, 45 P.3d 541, 545 (Wash. 2002):

> [W]e hold that an inmate witness, whether testifying for the defense or the state, should not appear before a jury in restraints absent a finding of necessity by the trial court....

However, a party must request a hearing on the issue. *Id.* at 545-7. If the person is allowed to testify while restrained, then the defendant should request a curative instruction that the jury not consider the restraints in assessing the witness's credibility or the defendant's guilt. *Id.* A shackled witness does not in and of itself require a new trial; instead, the circumstances are examined and it is determined if prejudice occurred. *Id.*

Michigan, too, agrees there is a prejudice weighing which occurs; merely being in shackles does not require a reversal. *People v. Reynolds*, 2001 WL 716797, at *6 (Mich. App. March 9, 2001), *app. den.,* 635 N.W.2d 321, 2001 WL 1326707 (Mich. Oct. 29, 2001) (TABLE), *habeas corpus den., Reynolds v. White*, 2003 WL 22387586, *11 (E.D. Mich. Sept. 23, 2003).

Finally, in *People v. Montonen*, 2005 WL 1030174 (Cal. App. 1 Dist. May 3, 2005), California refused to rule that a witness's appearance in prison garb constituted reversible error and further concluded that if there was any error, such error was harmless.

The question here is whether defendant is entitled to a new trial because trial counsel did not object to the witnesses testifying in prison garb and shackles. The answer is no. Defendant cannot meet the *Strickland* standard because he cannot show prejudice.

First, defendant cannot show that the Court would have granted any request that the

witnesses be allowed to change into street clothes[13] and/or not be shackled. Although this is pure speculation, the Court doubts it would have granted such a request after weighing the safety issues with the fact that the jurors would be made aware of the witnesses' criminal convictions and incarcerated status anyway.[14] The real question is whether defendant was prejudiced because no instruction was given telling the jurors not to allow the clothing and restraints to affect their decisions on the burden of proof and credibility.

In this case, defendant did not suffer any prejudice from the appearance of the witnesses in inmate clothing and restraints and/or from the failure to give a credibility instruction regarding the same. The defense elicited the fact that Dismuke was incarcerated. Nelson himself, without prompting, noted he was incarcerated. Thus, the jury would have expected the witnesses to wear prison clothes and be shackled; the clothing and shackling of Nelson and Dismuke did not undermine their credibility any further than the information obtained on direct examination concerning their status and criminal record. *See State v. Neulander*, 2006 WL 3798706 (N.J. Super. A.D. Dec. 28, 2006), *cert. den.*, 921 A.2d 448 (N.J. 2007) (TABLE). *Accord State v. Smith, supra,* at *4. The defense also brought out that DeShields was incarcerated. As was the case in *Angel v. Roe*, where everyone involved was mired in a culture of lawbreaking, "[i]t is not reasonably likely the jury was so swayed by the security environment it disregarded its duty to assess evidence on the issue of ... [petitioner's guilt]." *Angel v. Roe*, 2005 WL 2105222. *7 (E.D. Cal. Aug. 30, 2005), *report and recommendation adopted by Angel v. Roe*, 2006 WL 37019

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[13]This Court would not adopt an absolute rule like New Jersey's requiring all incarcerated individuals be allowed to wear street clothes when testifying.

[14]As this Court noted, out of the jury's presence, both sides, the State and the defense, were "relying on witnesses who bring a lot of baggage." K-109.

(E.D. Cal. Jan. 4, 2006), *aff'd*, 256 Fed. Appx. 907 (9th Cir. Nov. 15, 2007).

In conclusion, I rule that the shackles and prison garb and the lack of an instruction regarding the appearance of these witnesses did not cause prejudice to defendant which requires a reversal of the jury's verdict in this case. This claim fails.

9) Cumulative errors claim

Finally, defendant argues that even if none of the individual errors specified in the numerous grounds set forth above, standing alone, amounted to a violation of defendant's Sixth Amendment right to effective assistance of counsel, when viewed cumulatively, the multiple errors show that Smith's Sixth Amendment rights were violated. I have not found errors. Thus, I reject the cumulative errors argument. *Zebroski v. State*, 822 A.2d 1038, 1049 (Del. 2003), *cert. den.*, 540 U.S. 933 (2003). Defendant has failed to establish ineffective assistance of counsel on this claim.

CONCLUSION

For the forgoing reasons, defendant's motion for postconviction relief is denied.

IT IS SO ORDERED.